

No. 28

Office - Supreme Court, U. S.  
FILED  
OCT 28 1954  
HAROLD B. WILLEY, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1954

ROBERT A. MOALLISTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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Washington 25, D. C.

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No. 23

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT*

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## **SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES**

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The Government's contention (Govt. Br., Point I) that, on the record made, there is an inconsistency in petitioner's position—one which independently substantiates the correctness of the court of appeals' judgment—was rested on two propositions:

(1) That petitioner's declarations, as well as his petition and brief to this Court, fixed the onset of illness at or shortly before November 11, 1945;<sup>1</sup> and

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<sup>1</sup> As to this proposition, questions were raised at oral argument as to whether all of the symptoms described by petitioner at R. 30 and declared by his medical expert to be polio

(2) that both courts below had concurred in an unchallenged finding (which was, incidentally, asserted to be correct in the oral argument on behalf of petitioner) which placed the influx of Chinese personnel during the *Haines'* second stay in Shanghai, *i. e.*, between November 11 and November 23.

During petitioner's rebuttal, Mr. Justice Black, noting that in the earlier *Cosmopolitan* litigation the court of appeals' opinion referred to the Chinese influx as having occurred during the *Haines'* first stay in Shanghai (see Govt. Br., p. 21), requested information as to the evidence underlying the finding in the instant case that the asserted acts of negligence occurred during the second stay in that port. For this purpose, the parties were afforded opportunity to submit supplemental memoranda.<sup>2</sup>

Since the second case was tried by the same trial counsel who appeared in the first case, since these counsel were highly conscious of the contents of the first record to which they made frequent reference, and since the second record is in symptoms (R. 106), occurred on or before November 11. Petitioner declared these symptoms in response to a question (R. 21-22) which related solely to whether he contracted his illness prior to the November 11 arrival in Shanghai. Moreover, petitioner's answer (R. 30) stated that the described symptoms "continued and increased" from November 11.

<sup>2</sup> As of this writing, the Government has not been served with a memorandum by petitioner. In the interest of timeliness, we have proceeded to prepare and to send this memorandum to the printer without further delay.

many respects a cryptic one, it is helpful to note, at the outset, what transpired at the first trial in relation to the question raised. In that trial, the first witness called by counsel for petitioner was the first mate of the *Haines*, George A. Linnartz. Linnartz testified fully and explicitly as to when the Chinese first boarded the *Haines*. No. 351, October Term, 1948, R. 33-35, 58-59. In so testifying, he referred to the ship's logs for information (though the logs, themselves, were not made a part of the record). He declared that Chinese first boarded the *Haines* on November 13, and that they continued to come aboard between that date and November 23, when the vessel set sail for North China, which was the destination of the Chinese passengers. *Ibid*. There was conflicting testimony by other witnesses, based upon recollection rather than upon examination of the logs, that Chinese came aboard during the vessel's first stay in Shanghai. See the Government's brief in the instant case, page 21, note 7.

At the second trial, petitioner's counsel read an amended libel into the record (see R. 75). When asked by trial counsel on behalf of the Government<sup>3</sup> to state the dates of the asserted acts of negligence, he replied (*ibid.*), "While in the employ of the respondent on the *Haines*." During the course of the trial, the parties appear to

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<sup>3</sup> The Government was represented in the district court and in the court of appeals by private counsel.

have largely ignored the question of the exact dates when the Chinese came aboard ship, though, of course, there was considerable testimony that they came aboard at Shanghai. The ship's logs were not offered in evidence by either party (though Captain Leavitt identified the logs when he testified on deposition, see R. 408-409), and most of the testimony touching on this time factor was fragmentary and inconclusive. Captain Leavitt's testimony indicates that the Chinese passengers were carried north,<sup>4</sup> but it does not specifically exclude the possibility that they boarded at Shanghai prior to the trip south to Hong Kong and remained on board until the subsequent trip north. One member of the crew (McLeod) testified that the Chinese were aboard all the time that the ship was in China (R. 201), and that the soldiers who were taken to North China were picked up not in Shanghai but in Hong Kong (R. 198).<sup>5</sup> The testimony of the pharmacist's mate (Napier) suggests that the Chinese were aboard during the second stay in Shanghai, but does not expressly exclude the

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<sup>4</sup> Note the reference at R. 398 to "sanitation facilities for the Chinese soldiers and truckdrivers" on "the trip from Shanghai to Taku Bar." Taku is north of Tsingtao.

<sup>5</sup> Petitioner, in answer to interrogatories, stated that the Chinese passengers came aboard at Shanghai, R. 32. In the first trial, he had stated that they came aboard several days prior to November 24. No. 351, October Term, 1948, R. 12. This statement was quoted during the course of cross-examination in the second trial. R. 175.

possibility that they were aboard at other times (R. 321).

After the trial, proposed findings and briefs were filed. The relevant findings proposed by petitioner do not distinguish between the two stays in the port of Shanghai. They read:

6. That after the vessel's arrival at Shanghai, various shore people were permitted to come aboard without physical examinations to do stevedoring work, as well as a number of additional passengers. They used the common toilet facilities of the vessel and a common drinking fountain. Likewise, the toilet facilities intended for the crew were used by the Chinese who came on at Shanghai.

7. That while the vessel was at Shanghai and several days prior to the 24th day of November, 1945, and on or about the 11th day of November, 1945, libelant took sick, which condition was officially reported by Patrick E. Napier, the pharmacist's mate in a report which gives the date of illness as November 24, 1954.

The Government's proposed findings did not deal with the dates the Chinese came aboard, but its trial brief stated:

After the *Haines* arrived back at Shanghai on November 11, 1945, it appears that some cargo was discharged and some loaded, with five groups of Chinese coolies of about 25 to a gang, and that prior to her departure for Tsingtao on November

23, 1945, she took on board as passengers 40 or 50 Chinese soldiers and about 25 Chinese army truck drivers and mechanics for a number of trucks which were loaded on board and consigned to Tsingtao. There were also a few Chinese civilians taken on board as passengers for the trip to Tsingtao.

This interpretation of the evidence was adopted by the trial court and by the court of appeals. Eng. 9, R. 432; court of appeals' opinion, R. 447. Petitioner has never excepted to it, but has, indeed, expressed his agreement with it in this Court. And since the finding was not in issue between the parties, the underlying evidence on this point was not explored by either party in the briefs filed with this Court. For the same reason, government counsel who prepared the briefs and argued the case in this Court did not think it necessary, and did not in fact, go behind the record evidence on this matter in preparation for the presentation of the case.

Mr. Justice Black's query at the oral argument initiated an inquiry into this matter. Examination of the underlying evidence, undertaken in response to the request from the Bench, showed, as pointed out above, that the record was sparse and possibly open to conflicting interpretations. In order to arrive at a clearer understanding of the true picture, we arranged to have the logs of the *Haines* (which were not a part of the record either in this Court or in the lower courts) for-

warded from New York to Washington for examination.

Careful examination of the log entries confirms the finding that numerous Chinese passengers (troops, truck drivers, mechanics), as well as stevedores, came aboard during the *Haines'* second stay in Shanghai. But insofar as the finding implies (as we think it clearly does) that Chinese did not similarly come aboard during the first stay in Shanghai, it appears to be contrary to the true facts, if credence is to be given to the log entries. It appears from those entries that a number of Chinese came aboard during the first stay in Shanghai; that, for undisclosed reasons, Chinese passengers were taken south to Hong Kong and brought back to Shanghai; and that, accompanied by additional Chinese personnel who came aboard during the second stay in Shanghai, they were then transported to North China.

Thus, while we remain convinced that petitioner's claim, as he makes it, does not jibe with the record and findings of the courts below, we also are convinced by material *dehors* the record—material which appears to be entirely reliable—that petitioner could have shown (by introducing the log entries referred to above) that Chinese came on board during both stays in Shanghai. Had petitioner done so, it would be immaterial, from the standpoint of the consistency of his

theory, whether his illness had its onset shortly before or shortly after the second arrival in Shanghai.

The above information, which (as noted above) came to the attention of counsel for the first time subsequent to oral argument of this case, lead us to believe that the Government's Point I, predicated on inconsistency as to dates, should be abandoned. While that point finds adequate support in the record as made, and there is much to be said for confining consideration by this Court to that record, we feel that in a case of this type the Government should not stand in this Court on a finding which appears to be clearly contrary to the true facts as we can now appraise them. We are mindful, in this connection, that in admiralty this Court may, in special circumstances, consider additional evidence. Admiralty Rule 45. We accordingly request that the Court regard the contention made in Point I of the Government's main brief as waived.\*

Points II and III of the Government's brief remain unaffected. We there argue:

(a) That, assuming that Chinese came on board before petitioner took ill, the hypothesis that they, rather than other sources of potential infection, were responsible for petitioner's contracting the virus is, as Judge Hand stated, "wholly speculative."

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\* As the Court is aware, this point was not the basis of the court of appeals' judgment.

(b) That the mere fact that polio was known or believed to be ashore in Shanghai—there having been no showing that it existed in epidemic proportions and the evidence strongly indicating the contrary—was insufficient to warrant the trial court's holding that the admission of Chinese to the ship and the failure to keep them segregated constituted negligence.

On these grounds, we continue to urge with undiminished vigor that the judgment of the court of appeals be affirmed.

Respectfully submitted.

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OCTOBER 1954.